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Past and future of the ban on returning Palestinian Arabs to Israel. A crime of persecution for a people who continue to suffer

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Abstract: This paper addresses and highlights the crime of persecution of displaced Palestinian Arabs. There are more than seven million displaced Palestinians worldwide, particularly in countries such as Syria, Jordan, Lebanon, and Palestine. The role of the prosecutor in recent years has been very important, and the issues under discussion are numerous. For example, the population has been banned from relocating to their areas of origin in Israel. Under international law, return to the country is guaranteed as a fundamental right. The severe deprivation of internationally defined rights based on ethnicity, nationality, religion, race, etc. constitutes the crime of persecution as a subcategory of crimes against humanity, prosecutable by the International Criminal Court (ICC). Displaced Palestinian Arabs have met the prerequisites for an investigation that could lead to charges against Israeli officials for denying Palestinian Arabs the right to return.

Keywords: ICC; displaced population; right of return; crime against humanity; persecution; war crime; repatriation; inhumane acts.

Introduction

“The Palestinian refugee problem will be solved outside the borders of Israel” was a thoughtful expression declared in 2011 by Israeli Prime Minister Benjamin Netanyahu during a congress in the United States.¹ This statement was consistent with the practice that had been followed by Israel until the problem began.

In 1948, the Arab population was part of Palestine, which Israel controlled (Liakopoulos, 2024b). The ban on return for Arab refugees to Palestine, who declared themselves Palestinian Arabs, was condemned.² Israeli officials implemented a policy that committed the crime that followed the rules of the International Criminal Court (ICC).

The jurisdiction of the ICC and its application required jurisdiction to prosecute specific crimes, namely the founding treaty in the ICC Statute. The categories of crimes included are: aggression, genocide, war crimes, and crimes against humanity.³

¹US Congress, 157 Congressional Record 72, at H3350, 24 May 2011: <https://www.congress.gov/congressional-record/volume-157/issue-72/daily-digest> Accessed on 20.09.2025.

²Assistance to Palestine refugees, UN General Assembly Res. 76/77, 9 September 2021.

³Rome Statute of the International Criminal Court, Article 5, 17 July 1998, 2187

The category of crimes against humanity is called crime of persecution according to Art. 7 of the Statute of the ICC (ICC Statute) (Ambos, 2022b).

The subject matter and jurisdictional requirements are satisfied for the persons being prosecuted. The criminal conduct occurred at the time the ICC Statute was in force and applied to the states concerned. The jurisdiction of persons at the ICC was limited according to the accession of the states concerned, as predetermined by the ICC Statute.

The requirements were addressed preliminarily by determining the prohibition of repatriation for Palestinian Arabs. Such requirements qualified the crime of persecution that was incriminated. This is a jurisdiction over persons who were responsible for the prohibition of repatriation of Palestinian Arabs. The timeframe of the individuals' conduct was verified at the time it fell within the jurisdiction of the ICC.

Article 7 and prescriptive jurisdiction concerned questions relating to the possibility of formulating one's own charges. An executive jurisdiction, as well as that of the ICC, obtained physical custody of a person who prohibited the repatriation of Palestinian Arabs within its jurisdiction.

Criminal liability forced Palestinian Arabs to leave their country. The question of criminal liability (Liakopoulos, 2019b)

UNTS 3.

was oriented towards the prohibition of repatriation.

Israeli officials and jurisdiction

The ICC's jurisdiction over individuals who commit crimes falls within the jurisdiction of the court, which was under the control of the UN Security Council.⁴ Its jurisdiction over individuals was limited to the accession of certain states under the Rome Statute.⁵

Jurisdiction over acts committed by a national of a state party was similar to jurisdiction committed aboard an aircraft registered in the name of a state party. Jurisdiction over acts committed within a state party's territory followed Art. 12, paragraph (b) ICC (Ambos, 2022b).

Jurisdiction over nationals of non-party states within its territory requires the appropriate authorizations of Art. 12, paragraph (c) ICC (Ambos, 2022b).

ICC and the status of Israel

The ban on repatriation for Palestinian Arabs was imposed by Israel, by persons holding official positions (O'Keefe, 2015).⁶

⁴Article 13(b) ICC. This article does not address the possibility that the Security Council might refer the situation of the prohibition against return of the Palestine Arabs. To date, no such referral has occurred.

⁵Article 13(b) ICC.

⁶O'Keefe affirms that: "(...) Article 7 ICCS does not limit liability to persons holding government positions (...) a person could be charged (...)".

Legislation determined the right of entry.⁷ Legislation determined who was entitled to entry according to Article 125, paragraph (b) of the ICC (Ambos, 2022b).

The Cabinet and executive departments monitored entry, as did the Defense Forces and the Population and Immigration Authority. Officials and the penal bureaucracy implemented the exclusion legislation.

The jurisdiction of the persons extended to Israeli citizens and to conduct undertaken in Israeli territory according to the Rome Statute of 2000. However, the signatory state had to ratify it to become a party to it, according to Article 125, paragraph (b) of the ICC (Ambos, 2022b). As early as 28 August 2002, Israel notified the UN Secretary-General that “Israel did not intend to become a party”.⁸ Israel has not ratified the Rome Statute. This means that the ICC did not have jurisdiction over persons of Israeli nationality. Their conduct was conducted in Israel. However, an Israeli official had the nationality of an ICC member state and the jurisdictional requirement was therefore satisfied in this way.

Palestine and Jordan were parties to the ICC Statute.⁹ The ICC

⁷Israel, Entry into Israel Law 5712-1952, 5 September 1952 (and subsequent amendments).

⁸Multilateral Treaties Deposited with the Secretary-General, <https://treaties.un.org/pages/participationstatus.aspx> Accessed on 20.09.2025.

⁹Multilateral Treaties Deposited with the Secretary-General, <https://treaties.un.org/pages/participationstatus.aspx> Accessed on 20.09.2025.

Chamber confirmed that the objectives of the ICC also included the territory comprising Gaza and the West Bank together with East Jerusalem (Liakopoulos, 2022).¹⁰

Prohibition of repatriation and territoriality

The territorial basis of jurisdiction applies the prohibition of repatriation of Palestinian Arabs (Cormier, 2020). Criminal jurisdiction applies to conduct occurring both in the perpetrator's location and in the location of impact, which has a certain effect on conduct.¹¹ A person who fires a projectile across the international border kills a person from another state. The conduct thus falls under the jurisdiction of each state.

According to the ICC Statute, prescriptive jurisdiction applies to conduct occurring within a state party's territory, according to Art. 12, paragraph 2, letter b) of the ICC Statute (Ambos, 2022b). The conduct of Israeli officials prohibits repatriation and affects Palestinian Arabs residing in Jordan and Palestine. Such a situation is verified by the ICC, which establishes territorial jurisdiction and applies to an impact state.

The forced deportation of the population from Myanmar to Bangladesh, that is, the conduct of the perpetrators that occurred

¹⁰Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, par. 118, 5 February 2021, ICC-01/18.

¹¹US Supreme Court, *Heath v. Alabama*, 474 US 82 (1985): <https://supreme.justia.com/cases/federal/us/474/82/> Accessed on 20.09.2025.

in Myanmar, is not part of the statute. This means that the victims are forced to move to neighboring Bangladesh, which is indeed part of the statute. The prosecutor of the ICC established the conduct that occurred in Myanmar and Bangladesh.

The ICC Chamber also agreed. Therefore, it was held that the court had prescriptive jurisdiction even if a legal element of a crime falls within the court's jurisdiction and/or is part of that crime committed on the territory of a state party.¹² The Chamber referred to general international law, supporting a final conclusion.¹³

The legislative provisions differed among states and provided for prescriptive jurisdiction only as an aspect of the crime that occurred on their territory. This is a cross-border reference, like the crime of expulsion. The same circumstance also applies to the prohibition of repatriation.

The perpetrators are in one state and the victims in another, not necessarily neighboring, state. The ICC chamber examined a different phase for the prosecutor's request regarding Bangladesh/Myanmar.

The laws of several states provide prescriptive jurisdiction for a specific situation involving a crime committed abroad. States

¹²Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, par. 64, 6 September 2018, ICC-RoC46(3)-01/18.

¹³Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, par. 65, 6 September 2018, ICC-RoC46(3)-01/18.

exercise jurisdiction over acts committed in a foreign state based on the impact on their territory,¹⁴ a situation that it was also applied to Palestinian Arabs, who place the territorial rule of being related to crimes that impact another jurisdiction, implying territorial jurisdiction for conduct that prohibits the repatriation of those residing in Palestine and Jordan.

Temporal jurisdiction and prohibition of repatriation

An important requirement when committing an unlawful act concerns jurisdiction. The ICC has jurisdiction only for acts committed after its entry into force, that is, on 1 July 2002, according to art. 11, paragraph 2, of the ICC Statute (Ambos, 2022b).

No one can be held liable for conduct committed before its entry into force, according to Art. 24, paragraph 1, of the ICC Statute (Ambos, 2022b). The temporal limitation concerns the accession dates of the ICC Statute for states with territorial jurisdiction. For Palestinian Arabs in Jordan, 1 July 2002 was a starting date for obtaining territorial jurisdiction, according to Jordan's ratification of the ICC Statute.¹⁵

¹⁴Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, par. 56, 14 November 2019, ICC-01/19.

¹⁵Multilateral Treaties Deposited with the Secretary-General, <https://treaties.un.org/pages/participationstatus.aspx> Accessed on 20.09.2025 (showing Jordan ratification dated 11 April 2002).

The Palestinian Arabs in Gaza and the West Bank were deported by virtue of a declaration filed from Palestine on 13 June 2014, i.e., from the year that conferred jurisdiction.¹⁶ The Palestinian Arabs were departing even before the existence of the ICC.¹⁷ The forced transfer of population and deportation is punishable as a crime against humanity under Art. 7, par. 1, letter d) of the ICC (Ambos, 2022b).

The conduct of the departure from 1948 qualified as forced transfer. The deportation as well as the prohibition on repatriation were considered as a departure conduct dating back to 1948. However, this is a scenario that falls outside our analysis. The question therefore arises as to whether the prohibition on repatriation pursued the statute of the ICC.

Jurisdiction over return bans

To date, we have not encountered any criminal proceedings before the ICC relating to the repatriation of a displaced population, nor have any ICC chambers held such conduct fall within the jurisdiction of the ICC. This situation also applies to the case of the Rohingya from Myanmar who have found refuge

¹⁶Article 11(2) and Article 12(3) ICCS. Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014. This was followed by Palestine's accession to the Rome Statute on 2 January 2015.

¹⁷Palestine-Progress Report of the United Nations Mediator, par. 11, UN General Assembly Res. 194, 11 December 1948.

in Bangladesh. In this regard, the chamber has stated that:

“(...) the authorities of Myanmar supposedly impede their return to Myanmar (...) allegations were to be established to the required threshold, preventing the return of members of the Rohingya people falls within article 7(1)(k) of the Statute (...) no one may be arbitrarily deprived of the right to enter one’s own country (...) a character similar to the crime against humanity of persecution, which means the intentional and severe deprivation of fundamental rights contrary to international law (...)”¹⁸.

The Second Trial Chamber of the ICC examined the investigation into Bangladesh/Myanmar, highlighting the crimes committed against humanity, also listing inhumane acts according to art. 7, par. 1, letter k), such as infliction of serious suffering, serious injury.

These are intentional and grave violations according to customary international law for displaced persons to return in a safe and humane way to their country of origin, based on a sufficient link with persecution on ethnic and religious grounds according to art. 7, par. 1, letter h), which refer to deportation and violation of the right of return.¹⁹

The elements for crimes of persecution concern art. 7, par. 1 of the StICC (Ambos, 2022b) within a list with the types of conduct that constitute crimes against humanity.

¹⁸Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (Bangladesh/Myanmar), par. 77, 6 September 2018, ICC-RoC46(3)-01/18.

¹⁹Pre-trial Chamber III, Situation in the People’s Republic of Bangladesh/Republic/Republic of the Union of Myanmar, Request for Authorization of an Investigation Pursuant to Article 15, par. 75, 4 July 2019, ICC-01/19.

Persecution is considered by a group of communities that identify themselves on political, racial, national, ethnic, religious grounds as defined in par. 3 as well as by other universal grounds which are recognized as inadmissible under international law and by acts of this paragraph concerning any crime within the jurisdiction of the member state.

Article 7, paragraph 1, letter k) as well as other acts are among the acts considered inhuman. The conduct constitutes the crime of persecution according to the definition of Article 7, paragraph 2, letter g). Thus, persecution means the intentional deprivation of fundamental rights that are contrary to international law according to the identity of the group and collectivity.

The elements of the crime of persecution are among the elements of crimes, namely, a document of a committee of experts provided for by the ICC Statute. This conduct was part of a widespread and systematic attack against the civilian population.²⁰

The jurisdiction for the crime of persecution and the rights are violated. Human rights instruments are incorporated as a source of law in Article 21 of the ICC Statute (Ambos, 2022b), which requires the ICC to apply the constituent elements of crimes and the rules of procedure and evidence in this statute.

²⁰Elements of Crimes, Article 7, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

Applicable treaties and principles under international law allow the ICC to address persecution in accordance with instruments and principles relevant to human rights and humanitarian law. The ICC Chamber identifies and defines human dignity under international human rights standards. These are established by the Universal Declaration of Human Rights and by other international human rights instruments, as well as by rights enshrined in international humanitarian law (Liakopoulos, 2019a; Liakopoulos, 2024a).²¹

The *actus reus* in persecution seeks to deprive rights. This is a serious deprivation, given that rights are fundamental and protected under international law. The deprivation is intentional and also affects the identity of the group and the community.

The group and the community should engage in a specific type of conduct that impacts the group or community, which is undertaken for racial, national, religious, or gender reasons, according to paragraphs 1 and 2. 3 and 34, that is, for universal reasons that are recognized as inadmissible under international law.

Persecution linked to the right of return and its application

The right of return to one's country is enshrined in human rights

²¹Pre-Trial Chamber VI, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Judgment, par. 991, 8 July 2019, ICC-01/04-02/06, citing and quoting ICTY, Prosecutor v. Kupreškić et al., Trial Chamber, Judgment, par. 621, 14 January 2000, IT-95-16.

instruments, as evidenced by the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). According to Article 5, states parties are committed to prohibiting and eliminating racial discrimination in such forms as to guarantee the right of all without distinction as to race, color, equality before the law, etc. These instruments are not linked to the right of entry and are based on a reason outside the country.

The right of entry is linked to the moment of departure. It applies to persons who have never left and who have a required connection. The absence of Israeli status, like the right of entry, has been enshrined in treaties such as the Universal Declaration and international practice, considered a customary norm (Tomuschat, 1989).²² It is part of Article 5. 21 StICC (Ambos, 2022b) as part of international law rules, such as the chamber of ICC which has affirmed as a customary international right for displaced persons to return in a safe, humane way to their state of origin.²³

Population groups and the right of entry

The entry ban for individuals and for an entire population was

²²Commission on Human Rights Res 1988/4 of 22 February 1988 affirming “(...) right of the Afghan refugees to return to their homes in safety and honour (...)”. (UN Doc E/CN.4/RES/1988/4, par. 4).

²³Pre-Trial Chamber III, Situation in the People’s Republic of Bangladesh/Republic/Republic of the Union of Myanmar, Request for Authorization of an Investigation Pursuant to Article 15, par. 75, 4 July 2019, ICC-01/19.

upheld by both chambers of the ICC, which applied the right to the Rohingya population. In Georgia, the breakaway region of Abkhazia displaced a population through hostilities. The UN Security Council declared that the repatriation was necessary under the right of refugees to return to their homes.²⁴

The International Court of Justice (ICJ) found a violation for the population of the Chagos Archipelago. The ICJ explained that the population of the Chagos Archipelago prevented their return and repelled the force that prevented their return to the United Kingdom.²⁵

The ICJ considered the deprivation of return to be a violation of human rights for the population. There is no clear affirmation of the right to resettlement, which was independently protected by any treaty.

Palestinian Arabs and the right of entry

The return of Palestinian Arabs was a concern for the international community until 1948. The international body responsible for monitoring racial and ethnic discrimination and the Committee for the Elimination of Racial Discrimination conducted a periodic review for the states that were party to the CERD.²⁶

²⁴UN Security Council Res. 876, par. 5, 19 October 1993.

²⁵Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (adv. op.), [2019] ICJ Rep 95, at 110.

²⁶International Convention on the Elimination of All Forms of Racial

The responsible international body monitored racial and ethnic discrimination, and the Committee completed its review for the state formulating an assessment presented in a document entitled “Concluding Observations”. From 1987, the Committee stated that it followed Article 5, a provision relating to the right of entry. In this regard, it stated:

“(...) article 5 of the Convention, members of the Committee wished to know why Israel did not permit the Palestinian Arabs who had been driven from their lands to come back and obtain the same treatment as Jewish people in respect of the recovery of their land (...) to ensure equal rights for Palestinians in respect of the rights referred to in article 5.45 (...)”.

The Committee considered the denial to be part of a monitoring body for discrimination. It demonstrated that the denial was based on factors that pertained to the crime of persecution under the StICC, that is, acts against any group or collectivity identified for political, national, ethnic, cultural, or religious reasons. In 1998, the Committee returned to the issue of concluding observations according to the Israel review:

“(...) the right of many Palestinians to return and possess their homes in Israel is currently denied. The state party [Israel] should give high priority to remedying this situation. Those who cannot repossess their homes should be entitled to compensation (...)”.²⁷

In the 2007 Israel review, the Committee found that the

Discrimination, Article 8, 660 UNTS 195.

²⁷Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel, 30 March 1998, §18, UN Doc. CERD/C/304/Add.45.

violation concerned:

“(...) the denial of the right of many Palestinians to return and repossess their land in Israel (article 5 (d) (ii) and (v) of the Convention) (...) reiterates its view, expressed in its previous concluding observations on this issue, and urges the state party to assure equality in the right to return to one’s country and in the possession of property (...)”²⁸.

The ban on repatriation for Palestinian Arabs, as an annual agenda item of the UN General Assembly, called on Israel to carry out its repatriation. In its 2016 resolution, the General Assembly stated that:

“(...) that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly Resolution 194 (III), has not yet been effected (...)”²⁹.

This is an opinion expressed by the General Assembly according to which the repatriation was legally obligated. Resolution 194 was adopted way back in 1948. The General Assembly called on Israel to allow Palestinian Arabs to return to their homes and established a tripartite committee to oversee the modalities of their repatriation.³⁰

The General Assembly established a committee with the aim of considering repatriation as an action required by law. As early as

²⁸Report of the Committee on the Elimination of Racial Discrimination, 70th session (19 February-9 March 2007) 71st session (30 July-17 August 2007), par. 211, UN General Assembly, Official Records, 62nd session, Supp. No. 18, UN Doc. A/62/18.

²⁹Assistance to Palestine refugees, UN General Assembly Res. 71/91, 22 December 2016.

³⁰Palestine-Progress Report of the United Nations Mediator, par. 11, UN General Assembly Res. 194, 11 December 1948.

1967, the Security Council noted that the repatriation of Palestinian Arabs was a just solution to the refugee problem, as well as a requirement for peace in the Middle East (Quigley, 2003).³¹

Identification of a group and/or of a collectivity

Acts qualified as crimes of persecution under Article 7, paragraph 1, letter h) of the ICC Statute (Ambos, 2022b) are directed against any identifiable group or collectivity. This element seems to satisfy Palestinian Arabs. They are an identifiable group. This is how Palestinian refugees are defined by the resolutions of the General Assembly of the UN.³²

The UN administration assisted Palestinian refugees in the Near East. Article 7, paragraph h) of the ICC Statute pertained to Palestinian Arabs, namely, the deprivation of their rights based on political, racial, national, cultural, and religious grounds, as well as on grounds that are universal and recognized as inadmissible under international law.

The ICC Chamber has established the connection between political victims as a criterion for satisfaction for their identification.³³ Palestinian Arabs are among the factors listed.

³¹UN Security Council Res. 242, par. 2(b), 22 November 1967.

³²Assistance to Palestine Refugees, UN General Assembly Res. 302, 8 December 1949.

³³Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Muhammad

The ancient population had been using the Arabic language and culture since the 7th century.³⁴ The prohibited repatriation concerned them alone. A ban based on ethnicity and nationality. A ban that brought to the attention of the Committee on Racial Discrimination. Israeli legislation was based on the concept of nationality to prevent Palestinian Arabs from obtaining it. In this regard, it was stated:

“(...) A person who, immediately before the establishment of the state, was a Palestinian citizen (...) become an Israel national with effect from the day of the establishment of the state if (...) was registered (...) (1st March 1952) as an inhabitant (...) he is an inhabitant of Israel on the day of the coming (...) he was in Israel, or in an area which became Israel territory after the establishment of the state, from the day of the establishment of the state to the day of the coming into force of this Law, or entered Israel legally during that period (...)”³⁵.

Palestinian Arabs were barred from entering the state of Israel after 1948, according to the drafted text, which represented a ban based on ethnic and racial grounds. Between 1948 and 1952 the entry was free for Jews.³⁶

Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and 61(7)(b) of the Rome Statute, par. 144, 23 January 2012, ICC-01/09 02/11.

³⁴Treaty of Peace (Britain, France, Italy, Japan, Greece, Romania, Serb-Croat-Slovene State, Turkey), Lausanne, 24 July 1923, Articles 30, 46, 28 LNTS 11.

³⁵Israel, Nationality Law 5712-1952, par. 3, 14 July 1953.

³⁶Knesset, Law of Return, 5 July 1950, par. 4: “(...) Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an Oleh under this Law (...)”.

The level of deprivation as a severe situation

Deprivation of rights is severe according to the definition of the ICC Statute. It is based on Article 7, paragraph 2, letter g) (Ambos, 2022b) as it is a fundamental right. The ICC Chamber was confronted with the application of a definition regarding the situation of persecution that stated:

“(...) The commission of any act considered to be a crime against humanity will (...) deprivation of fundamental rights of one or more individuals, would thereby meet, in and of itself, the minimum level of severity required (...)”.³⁷

The Chamber defined the severe level for the application of these elements. These elements appeared to be satisfied with regard to the ban and repatriation for Palestinian Arabs. The exclusion of Palestinian Arabs from Israeli territory deprives them of rights concerning their protection.

International attention was focused on statelessness.³⁸ The seriousness of the deprivation referred to the attention given by the UN General Assembly and the Security Council. From 1949, the deprivation was a topic of discussion by the UN General Assembly as a question relating to Israel's admissibility for UN membership, open only to states that desired and loved peace according to Article 4 of the UN Charter (Pellet, 2014).

³⁷Pre-Trial Chamber VI, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda, Judgment, par. 994, 8 July 2019, ICC-01/04-02/06.

³⁸Convention on the Reduction of Statelessness, New York, 30 August 1961, 989 UNTS 175.

Israel's refusal to repatriate Palestinian Arabs to a UN commission called the criterion for evaluating Israel's membership.³⁹

Denmark requested a refusal of repatriation consistent with the principle of Article 1, paragraph 2 of the UN Charter, according to the principle of equality and self-determination of peoples.

The particular circumstances of the Palestinian Arabs were based on the denial of repatriation and the gravity of the violation. Before 1948, they were engaged in agriculture and were cut off from their own means of subsistence. They had sufficient resources. They were denied access to bank accounts at Barclays Bank after the Israeli custodian of their assets (Milnes Holden, 1954). They filed suit against Barclays Bank in the United Kingdom.

The House of Lords, in the final stage of the proceedings, denied compensation for the Arab accounts.⁴⁰ Six years later, Israel released its necessary funds for the purpose of establishing an international institution for the relief and employment of Palestine refugees in the Near East.⁴¹

This organization is still operating today. It was funded by

³⁹UN General Assembly, 3rd session, Part II, Ad Hoc Political Committee, Summary Records of Meetings 6 April-10 May 1949, 47th meeting, 6 May 1949, at 273ss, UN Doc. A/AC.24/SR.47.

⁴⁰Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial, and Overseas), Ltd., [1954] 2 W.L.R. 1027, [1954] 2 All E.R. 226: <https://vlex.co.uk/vid/arab-bank-ltd-v-793114993> Accessed on 20.09.2025.

⁴¹Assistance to Palestine Refugees, UN General Assembly Res. 302, par. 7, 8 December 1949.

contributions from several states. Its annual budget in recent years has reached one billion dollars from the US alone.⁴² The ban on repatriation for Palestinian Arabs imposed a financial burden on the international community.

The UN General Assembly took this burden through the 2016 resolution on repatriation, stating that Israel continued its position on behalf of Palestinian refugees.⁴³ They were deprived of a land full of riches. The Palestinian Arab community was dependent on the charity of other countries (Albanese, Takkenberg, 2020).

In 2015, the UN General Assembly expressed some regret for the Palestinian refugees who suffered the loss of their homes, lands, and livelihoods.⁴⁴ The deprivation inflicted on Palestinian Arabs appears to constitute a grave denial of a fundamental right.

What are the elements of persecution?

First of all, we must state that the perpetrator's conduct includes its own elements. The crime of persecution thus entails requirements that are defined as chapeau elements. The

⁴²United Nations Relief and Works Agency for Palestine Refugees in the Near East, Programme Budget 2020-2021, Table 1-1 Biennium Budget 2020-2021 (September 2019).

⁴³Assistance to Palestine refugees, UN General Assembly Res. 71/91, 22 December 2016.

⁴⁴Assistance to Palestine refugees, UN General Assembly Res. 70/83, 9 December 2015.

perpetrator's conduct must be committed as part of an attack against a civilian population, that is, a widespread and systematic attack. This is a conduct that constitutes an attack on persons other than the perpetrator.

Are Palestinian Arabs a civilian population?

The civilian nature of Palestinian Arabs seems evident given that the act, committed as part of a widespread and direct attack, is directed toward a civilian population (Sadat, 2017). The civilian nature, according to Article 7, is not limited to the objectives of crimes against humanity but protects individuals and members of groups without limitations (Ambos, 2020). Thus, it includes distinct groups of nationality, ethnicity, and other distinct characteristics.⁴⁵

According to Article 7, paragraph 1, the definition of nationality is irrelevant. The presence of combatants among civilians deprives the population of its civilian identity (Liakopoulos, 2020).⁴⁶

The attack was directed against the population. This means that the concern is not based on specific factors of a single individual

⁴⁵Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, par. 81, 31 March 2010, ICC-01/09-19-Corr.

⁴⁶Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, par. 135. United Nations, International Law Commission, A/CN.4/680.

but rather against the population of one's own group.⁴⁷ This is the case of a ban on repatriation for Palestinian Arabs. The ban is directed at the group, not at individuals.

Repatriation as an attack and its prohibition

According to art. 7, par. 2, letter a) of the ICC, the term attack defines the purposes of crimes against humanity as:

“(...) Attack directed against any civilian population means a course of conduct (...) commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack (...)”.

The elements of crimes according to the ICC affirm that the acts constitute a military attack.⁴⁸ The Chamber of the Court has affirmed that the attack for the purpose of persecution is not equivalent to a military attack (Ambos, 2022).⁴⁹ Thus, the Chamber interpreted the attack as an operational conduct of a campaign against a civilian population.⁵⁰

⁴⁷Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, 136. United Nations, International Law Commission, A/CN.4/680.

⁴⁸Elements of Crimes, Article 7, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

⁴⁹Pre-Trial Chamber II, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, par. 75, 15 June 2009, ICC-01/05-01/08. Ambos affirmed that: “(...) legislation amounting to persecution may constitute an “attack” (...)”.

⁵⁰Pre-Trial Chamber II, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, par. 75, 15 June 2009, ICC-01/05-01/08.

The civilian population stated to the Chamber that the primary target of the attack is not part of an incidental victim.⁵¹

The Palestinian Arabs were targeted in an operational campaign. The ban on repatriation is part of a policy that involved the commission of multiple acts by multiple perpetrators within a given period of time. Thus, it is implemented in accordance with the state policy of Israel as a state, ascertained by the UN and treaty bodies.⁵²

The content of Article 7 did not contain territorial limits. An attack by a state occurred within its own territory. The perpetrator must act with knowledge of its own attack. A knowledge that has been defined under the ICC Statute in relation to the required mental elements as well as awareness of the existence of one's own circumstances.

The requirement of awareness clarifies that the attack is carried out by others. The perpetrator is aware of his own actions. It is also not necessary for the perpetrator to share responsibility with Israeli officials for preventing the entry of Palestinian Arabs. The knowledge criterion provided by the ICC Statute was not

⁵¹Pre-Trial Chamber II, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 78, 15 June 2009, ICC-01/05-01/08.

⁵²And see Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute, par. 160, 21 March 2016, ICC-01/05-01/08 (stating 'that the "policy" need not be formalised and may be inferred from a variety of factors which, taken together, establish that a policy existed').

necessary due to the Israeli political approach and the awareness that derives from one's own circumstances.⁵³ An awareness deriving from the nature of the official position held by the perpetrator.⁵⁴ The perpetrator's acts that require intent and the definitive crime for the intentional deprivation of fundamental rights is related to persecution and awareness of a widespread, systematic attack.

The StICC defines intentionality in relation to conduct and its consequences. Intentional conduct is present in the person who intends to carry out his or her conduct, according to Art. 32, par. 1, letter b) StICC (Ambos, 2022b). The consequence of intention occurs in a normal manner according to events.

The perpetrator, in the case in question, intends to carry out a conduct that prevents Palestinian Arabs from entering. The element of deprivation is found by reason of the group's and collective's identity as a circumstance accompanying the conduct that is sufficient for awareness.

The criterion of awareness comes into play as a circumstance.⁵⁵

⁵³Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, par. 151, United Nations, International Law Commission, A/CN.4/680.

⁵⁴Pre-Trial Chamber I, Situation in the Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, 30 September 2008, par. 402, ICC-01/04-01/07.

⁵⁵Article 30(3) StICC. Or reference could be made to domestic legal systems, as the ICC is directed to do by Article 21(c) StCC. In domestic systems, the level of mental culpability for offense elements that accompany the conduct may be less than is required for the conduct itself. See also: *US v. Feola*, 420 US 671 (1975): <https://supreme.justia.com/cases/federal/us/420/671/> Accessed on 20.09.2025.

If the Israeli official adopts a conduct that consciously prevents Palestinian Arabs from entering, that is, a conduct that is part of a policy of exclusion by the state of Israel, there is a risk of persecution. Therefore, the official's attitude towards a policy does not appear to matter (Ambos, 2022).⁵⁶

Persecution required discriminatory intent on the part of the perpetrator. The requirement of intent deprives rights, and the deprivation is based on a reason related to the identity of members of one's own group according to Art. 7, par. 2, letter b) StICC (Ambos, 2022b).

No feeling of hostility towards members of a group was required. In the Israeli context, deprivation of Palestinian Arab rights, as well as the perpetrator must be Arab. The StICC definition of persecution does not limit liability to perpetrators who have the nationality or ethnicity of their victims.⁵⁷ An Israeli official acted to deprive Palestinian Arabs of the right of entry to avoid being fired from their jobs and/or for other ethnic or racial reasons.

⁵⁶According to Ambos: “(...) A belief that might be held by an official that the right of return does not apply to the Palestine Arabs would not negate an awareness that the right does apply. If non-awareness that the right applies to the Palestine Arabs were to be asserted (...) the notoriety of the applicability of the right to the Palestine Arabs, given its reflection in the work of UN and treaty bodies. Thus, mistake of law under Article 32(2) ICC would seem not to excuse liability (...)”

⁵⁷The Elements of Crimes, by using the term ‘targeting’ to describe the perpetrator’s conduct, supra n 32, may give the impression of a requirement of an anti-racial or anti-ethnic animus. That term does not appear in the Rome Statute definition of persecution. The ICC, per Article 9(3) ICC, is directed to use the Elements of Crimes only to the extent they are consistent with the Rome Statute.

The systematic, widespread nature of the attack

The attack is part of the perpetrator's conduct, which is widespread and systematic.⁵⁸ The term widespread refers to the extent of victimization and the term systematic to planned, calculated, rather than random acts (Robinson, 1999).

The “operation and campaign” that detains the Palestinian Arab population meets the sufficient criteria. The number of people is far apart, making the attack widespread.⁵⁹ The displaced Palestinian Arab population is around seven million according to the StICC. The widespread nature satisfies the fact that the operation and campaign is extended across a geographical area that includes Jordan, Gaza, and the West Bank.⁶⁰

The ban on repatriation against Palestinian Arabs seems to qualify as systematic what is established by Article 7 and the Chamber of the ICC, namely, the organized nature of the acts and the probability that they occur causally.⁶¹ The ban on

⁵⁸Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, par. 125-127, UN, International Law Commission, UN Doc A/CN.4/680 (explaining that the two terms read in the disjunctive).

⁵⁹Sean Murphy, Special Rapporteur, First Report on Crimes Against Humanity, 17 February 2015, par. 128, UN, International Law Commission, UN Doc A/CN.4/680

⁶⁰Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, par. 177, 23 January 2012, ICC-01/09/01/11: “(...) perpetration over a substantial geographic area can show ‘widespread’ character as a context element in a prosecution for crimes against humanity by way of persecution under Article 7(1)(h) ICC (...)”.

⁶¹Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v.

repatriation is not causal but derives from the policy of the Israeli government.⁶² The same chamber has affirmed the existence of a state policy that automatically renders an attack systematic (Robinson, 2011; O'Keefe, 2015).⁶³

The requirement that the attack be widespread and systematic applies to the attack to which the perpetrator's conduct is a part. The perpetrator's own conduct does not apply (O'Keefe, 2015). A single act and/or omission by an official is sufficient for criminal liability.

What is the connection between persecution and act or crime?

The crime of persecution, as well as the perpetrator's act, is connected to any act according to Art. 7, paragraph 1. This crime is considered a crime within the jurisdiction of the court. This requirement stems from the statute of the Nuremberg Military Tribunal, which includes persecution for political, racial, and religious reasons.⁶⁴

Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, Decision on the Prosecution Application under Article 58(7) of the Statute, par. 62, 27 April 2007, ICC-02/05-01/07.

⁶²Assistance to Palestine refugees, UN General Assembly Res. 76/77, 9 September 2021 (noting that repatriation 'has not yet been effected').

⁶³Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman: Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, par. 62, ICC-02/05-01/07.

⁶⁴Agreement for the Prosecution of the Major War Criminals of the European Axis, London, 9 August 1945 (United Kingdom of Great Britain and Northern Ireland, United States of America, France, Union of Soviet Socialist Republics),

The United States has initiated an inclusion seeking a basis for investigating the persecution of Jews and others in Germany (Nilsson, 2011).⁶⁵

Persecution as a crime (O'Keefe, 2015; Ambos, 2022) has been linked to war crimes (O'Keefe, 2015). The development of this crime against humanity falls into a subcategory that prosecutes racial, political, religious, and ethnic elements, omitting its connection to any other act or crime.⁶⁶

Connection with an act or crime

As a requirement of another act or crime, the crime of persecution is explained as a:

“(...) conduct that was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court (...)”.

The requirement is jurisdictionally exclusive and provides that jurisdiction for criminal prosecution and for the crime of persecution is part of a psychological element concerning an act, a crime on the part of the perpetrator (Ambos, 2022) (Harris, 2018).⁶⁷

Annex: Charter of the International Military Tribunal, Article 6(c), 82 UNTS 279.

⁶⁵Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials (Department of State, Washington 1949), 394.

⁶⁶Draft Code Against the Peace and Security of Mankind, Article 18(e), YBILC [1996, vol II (Part Two)] 47.

⁶⁷Comments and Observations on the 2017 Draft Articles on Crimes against Humanity as Adopted on First Reading at the Sixty-ninth Session of the International Law Commission.

No other psychological element concerning the other act or crime on the part of the perpetrator was required. Thus, the requirement of contextual connection and the elements of the crime of persecution as an act, a crime, are not necessarily committed by the perpetrator and the perpetrator must have knowledge of the other act or crime (Byron, 2009).

An act is contested under Article 7, paragraph 1 StICC (Ambos, 2022b) as a crime within the jurisdiction of the ICC and as an act that in itself constitutes a crime against humanity (Robinson, 1999). The act is widespread or systematic and is considered a single act or crime (Byron, 2009).

The contextual connection is not entirely appropriate. The elements of the context, as well as the perpetrator's act, are part of it and within the author's knowledge. Another act or crime and the perpetrator's conduct have only a connection for the author, which is within his knowledge. Art. 7, par. 1, letter h) StICC has seriousness because the act and crime are in relationship with the deprivation of specific rights.

The requirement in any case is apparent and respects the violation. A chamber of the ICC confirmed the charge of persecution and considered the allegations made by the prosecutor to be sufficient, without however specifying their

connection to another act or crime (Liakopoulos, 2019a).⁶⁸

Acts under Article 7, paragraph 1 of the ICC that are related to the denial and repatriation of Palestinian Arabs

According to Article 7, paragraph 1, the crimes falling within the jurisdiction of the Court are related to the denial of repatriation of Palestinian Arabs. An act under Article 7, paragraph 1 and Article 7, paragraph 1, letter e) specifies imprisonment in violation of fundamental norms of international law. As early as 1954, Israel adopted a criminal statute to prevent what was defined as infiltration. This statute criminalized entry into one's country without prior authorization. It also defined the term of the infiltrator. In fact, the:

“(...) “infiltrator” is a person who has entered Israel knowingly and unlawfully and who at any time between the 16th Kislev, 3708 (29th November, 1947) and his entry was -a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan, Iraq or the Yemen; or -a resident or visitor in one of those countries or in any part of Palestine outside Israel; or a Palestinian citizen or a Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who, during the said period, left his ordinary place of residence in an area which has become a part of Israel for a place outside Israel (...)”⁶⁹.

⁶⁸Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Muhammad Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and 61(7)(b) of the Rome Statute, par. 283, 23 January 2012, ICC-01/09 02/11.

⁶⁹Israel, Prevention of Infiltration (Offences and Jurisdiction) Law 5714-1954, 16 August 1954.

Section 2 dealt with Palestinian Arabs who left their lands before 1948 and found refuge in Gaza in the West Bank, i.e., outside Israel. Section 3 concerned Palestinian Arabs who left before 1948. Palestinian Arabs were imprisoned under this law (Love, 1955; Jiryis, 1981).

The detention was imposed in violation of fundamental norms of international law, excluding Palestinian Arabs from their lands of origin. Article 7, paragraph 1, concerned the use of lethal force against Palestinians demanding their withdrawal upon return. Demonstrations under the name of the Great March of Return have been underway in Gaza since 2018. This effort was carried out in an area separating Gaza from Israeli territory.

The UN Commission of Inquiry examined the large-scale weekly demonstrations by Palestinians in the area separating Gaza from Israel, namely the Green Line that marked the 1949 Armistice Agreement, calling for the lifting of the blockade imposed on Gaza and the return of Palestinian refugees.⁷⁰

Israeli security forces responded with lethal means. The UN Commission of Inquiry states in this regard:

“(...) Since the end of March (2018) until 31 December 2018, over 6,106 Palestinians who participated in the GMR (Great March of Return) along the separation fence were shot, with 183 killed (...) The UN Commission of Inquiry noted, ‘Some 75 percent of Gazans are registered refugees’ and that

⁷⁰Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, par. 14, 25 February 2019, UN Doc. A/HRC/40/74.

they ‘are among the descendants of the 750,000 Palestinians who, during the 1948 conflict, fled or were expelled from their previous homes in today’s Israel (...)’.⁷¹

The Commission of Inquiry found in several cases that Israeli security forces killed Palestinian protesters who did not pose an imminent threat of serious injury or death.⁷² This conclusion is correct. Lethal use was qualified as murder for one of the acts included in Article 7, paragraph 1.

What crimes are related to the ban on repatriation?

According to Article 7, paragraph 1, the crimes related to the ban on repatriation imply and include the law of war. The crimes within the jurisdiction of the court include the war crimes listed in Article 8 of the ICC Statute (Ambos, 2022b).

The killings in the Gaza Strip are classified as acts of voluntary homicide and as war crimes under the Geneva Convention on Civil Rights,⁷³ specifying that the crime within the jurisdiction of the court under Article 8, paragraph a, letter i) of the ICC Statute includes belligerent occupation and the qualification of a war crime.

⁷¹Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, par. 18, 25 February 2019, UN Doc. A/HRC/40/74.

⁷²Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, 694, 18 March 2019, UN Doc. A/HRC/40/CRP.2.

⁷³Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 147, 75 UNTS 287.

This makes Israel's conduct in the Gaza Strip a crime within the jurisdiction of the court. Gaza was occupied by Israel in 1967. Israel withdrew its administration within Gaza in 2005 as a belligerent occupation by Israel.⁷⁴ The ICC Chamber has established belligerent occupation by Israel in both Gaza and the West Bank.⁷⁵ Another war crime specified by the StICC concerned the transfer of civilians to a territory under belligerent occupation and according to Article 8(2)(b)(viii) StICC.

The prosecutor thus established a reasonable basis for considering the context of Israeli occupation of the West Bank including also East Jerusalem as members of the Israeli authorities who committed war crimes under Article 8, para. 2, letter viii (Ambos, 2022b).

The transfer of Israeli civilians to the West Bank on 13 June 2014,⁷⁶ has as a consequence the ICC gaining jurisdiction over the territory of Palestine. Article 8, paragraph 2, letter b) (viii) of the ICC Statute deals with the transfer of civilians to the

⁷⁴Letter dated 29 December 2014 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, Annex: Declaration of 17 December 2014 adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, par. 8, UN Doc. A/69/711 – S/2015/1: “(...) certain measures taken by the Occupying Power in the Occupied Palestinian Territory, including the closure of the Gaza Strip (...)”.

⁷⁵ICC, Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report, par. 16, 6 November 2014. Pre-Trial Chamber I, Situation in the State of Palestine, Decision on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, par. 117-118, 5 February 2021, ICC-01/18.

⁷⁶ICC, Office of the Prosecutor, Situation in Palestine: Summary of Preliminary Examination Findings, par. 4, 20 December 2019.

territory under belligerent occupation. A significant number of Palestinian Arabs displaced under the 1948 Convention are finding refuge in the West Bank.⁷⁷

The transfer of civilians to the West Bank is linked to the ban on repatriation. Those with a legal right are excluded. The Israeli authorities have facilitated the resettlement of others. War crimes also concern the war in Gaza in 2014. War crimes according to the ICC Statute include the act of intentionally launching a knowing attack that causes loss of life and accidental and civilian injury. According to the prosecutor of the ICC:

“(...) there is a reasonable basis to believe (...) members of the Israel Defense Forces (“IDF”) committed the war crime of intentionally launching disproportionate attacks (...)”⁷⁸.

Disproportionate attacks target civilians, including those in Gaza. The commission of war crimes appears to link the ban on return to war crimes.

Who are the potential perpetrators?

The commission within its jurisdiction, i.e., the ICC, focuses on and establishes policies on criminal matters (Ambos, 2022).⁷⁹

⁷⁷UNRWA has registered nearly 900,000 Palestine Arab refugees in the West Bank.

⁷⁸ICC, Office of the Prosecutor, Situation in Palestine: Summary of Preliminary Examination Findings, par. 2, 20 December 2019.

⁷⁹Ambos affirms that: “(...) the seriousness of the acts that qualify as crimes against humanity is expressed by one commentator (...) the transgressor, that is, the criminal against humanity, becomes an enemy and legitimate target of all humankind,

Individuals hold official positions are not exempted from criminal liability.

The StICC distinguishes the official title. The official title for the head of state and for the government does not exempt the person from criminal liability under Art. 27, par. 1 StICC (Ambos, 2022b). In a national court, senior officials of foreign states enjoy criminal immunity for crimes.⁸⁰ This immunity, therefore, does not apply to the ICC.

A relationship between the conduct of an alleged perpetrator and the hierarchical structure emerges. According to the StICC, a superior is responsible for the criminal acts of his subordinates according to Art. 28, par. b) StICC (Ambos, 2022b).

Anyone acting on an order from a government and a superior can be exempted from criminal liability. According to the StICC, this liability did not exist if a person acted on an order from a government and/or a superior, whether military or civilian. This exemption applies only if the person did not know that the order was illegitimate.

The StICC clarified that an order to commit a crime against humanity is illegitimate and, as a consequence, criminal liability was not annulled when the perpetrator acted on the order of the superior.

a hostis humani generis, who, in principle, anyone (“the people”) may bring to justice (...).”

⁸⁰ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, [2002] ICJ Rep 3.

Action connected to criminal responsibility

A joint action within the spirit of the ICC has addressed issues that trigger criminal proceedings for war crimes and the transfer of civilians within occupied territory. This initiates criminal proceedings for war crimes and the transfer of civilians into territory under belligerent occupation (Aksenova, 2016).

Certainly, problems with joint action arise when criminal proceedings are initiated for war crimes and the transfer of civilians into territory under belligerent occupation. This constitutes the implementation of a state policy (McKenzie, 2020).⁸¹

The relevant liability is linked to the ICC, according to Art. 25, paragraph 3 (Ambos, 2022b). The general principles of criminal law and the criminal liability of a perpetrator are based on a joint action with others that achieves criminal objectives (Du Bois Pedain, 2020).

The StICC has provided for the use of general and legal principles that derive from the court's national laws and legal systems around the world (Schabas, 2020).⁸² The StICC and its provisions as well as its integration with the principles of national criminal law address a variety of ways to implement a

⁸¹McKenzie affirms that: “(...) conceptually similar issue of participation of Israeli officials in the war crime of transfer of civilians into settlements in occupied Palestine territory (...)”

⁸²Article 21(1)(c) ICC.

repatriation ban on Palestinian Arabs.

Omission and criminal liability

The attribution and conduct relevant to cases involving affirmative acts contrary to and other than abstention in domestic criminal law concern criminal liability (Ambos, 2020). The general principle of liability for omission, as invoked by the ICC and the Pre-Trial Chamber, states that persecution is based on the omission to act.⁸³

General principles of criminal law and criminal liability for omission are based on a duty to act (Ambos, 2020). A duty for persons occupying a protective position that respects legal interests also allows for a duty of protection. Liability for omission to act is limited to officials holding positions related to immigration policy and practice.

Defense arguments

The definition of the principle of *in dubio pro reo* applies at the ICC (Davidson, 2017). The definition of the crime according to the ICC Convention interprets restrictively and broadly by analogy the definition favoring the person investigated,

⁸³Pre-Trial Chamber II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and 61(7)(b) of the Rome Statute, par. 46, 23 January 2012, ICC-01/09-02/11: “(...) there is nothing in the Statute that can be interpreted to exclude acts by omission from the purview of the court (...)”.

prosecuted, and convicted under Article 22, paragraph 2, of the ICC Convention. This restrictive interpretation favors the right of entry without applying the situation of Palestinian Arabs.

What exceptions are there to the entry ban?

The first exception to the entry ban was formed during the pandemic. In this case, states denied entry to their own citizens seeking to return from states (Martha, Bailey, 2020).

The entry denials were not long-term but had a legal basis for denial. Denials under legitimate circumstances opened the way to arguments regarding the right of entry for Palestinian Arabs.

Article 12 of the ICCPR already included the guarantee of the right of movement within a country as well as the right to leave one's country. Article 2, paragraph 3, stated, in this regard, that:

“(...) not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (...)” (Taylor, 2020).

There are no provisions that allow restrictions based on grounds relating to national security, public order, health, morals, and the rights and freedoms of others. The circumstances identified an entry ban. The pandemic situation was addressed by the Human Rights Committee, which monitors the application of the ICCPR, as the Committee stated in 2020:

“(...) the right of derogation from the Covenant under Article 4 provided that

it is required to protect the life of the nation (...)"⁸⁴

The Committee explained and affirmed that its right to derogate from the Covenant, under Article 3, is a necessary condition to protect the life of the nation. Article 4 of the ICCPR provides for a status-based procedure that exempts compliance with a provision in the case of a public emergency that threatens life and the nation, as well as the existence of an officially proclaimed emergency⁸⁵ by communicating it to the Secretary-General of the UN.⁸⁶

The Committee expressed the opinion that the entry ban was a restriction on COVID-19 that violated Article 12, paragraph 1. 4. This derogation was necessary to exempt the state from its liability. A state that invokes the derogation procedure acknowledges that it is acting within the spirit of the ICCPR. By invoking the procedure in relation to the entry ban for Palestinian Arabs, Israel acknowledged the denial, thus constituting a violation.

Israel did not submit a derogation. Such a derogation in relation to the entry ban for Palestinian Arabs was problematic in any case, given that Article 4 emphasized that the derogation could

⁸⁴Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, par. 2, 30 April 2020, UN Doc. CCPR/C/128/2.

⁸⁵Article 4(1) and 4, par. 3 of ICCPR.

⁸⁶Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, par. 2, 30 April 2020, UN Doc. CCPR/C/128/2.

be discriminatory if based on race, color, sex, language, religion, or social origin.

Repatriation cannot be arbitrary

According to Article 12, paragraph 4 of the ICCPR, an entry ban is unlawful only if it is arbitrary. That is, a Palestinian can be arbitrarily deprived of the right to enter his or her country by an Israeli official alleging a denial of repatriation.

The issue of arbitrariness has been addressed by the Human Rights Committee, as the reference to the concept of arbitrary is emphasized and applies to all state, legislative, administrative, and judicial actions.

The intended interference of the law is guaranteed to be consistent with the provisions and objectives of the Covenant whenever it is reasonable under the logical circumstances. Thus, the Committee and the circumstances logically deprive an individual of the right to enter his or her country.⁸⁷

According to the Covid statement, the Human Rights Committee did not recommend a ban on entry into his or her country, thus denying non-arbitrariness. The Human Rights Committee affirmed a denial that violates Article 12, according to which a derogation is required to justify a violation. According to Article 5 of the CERD, the right of entry is not qualified by the word

⁸⁷Human Rights Committee, General Comment No. 27 Freedom of Movement (Article 12), §21, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9.

arbitrary. Consequently, according to CERD, an entry ban is not based on the reasoning of non-arbitrary entry.

A voluntary departure

Palestinian Arabs argue that they have the right to repatriation because they did not leave on their own initiative. The right to enter the country is not limited to the reason for departure. It is not a flood, earthquake, threat of war, and/or natural disaster. The law, in this case, permits repatriation. As we have seen, the Committee on Racial Discrimination has called on Israel to repatriate Palestinian Arabs without reference to the reasons for their departure, as they are deemed irrelevant.

The issue of Palestinian Arabs who do not have Israeli nationality enters into this spirit. States have the obligation to allow entry to their citizens, but this right is not limited to people who have been granted nationality by the state, thus denying their repatriation. The right of entry concerns the “one’s country”.⁸⁸

The right of entry applies as a change of sovereignty. Regardless of the nature of the sovereignty situation in Palestine and Israel, the areas of origin demand the repatriation of Palestinian Arabs. Emerging states such as Israel have maintained and respected

⁸⁸UDHR, Article 13(2), UN General Assembly Res. 217, 10 December 1948. International Covenant on Civil and Political Rights, Article 12(4), 999 UNTS 171. International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(ii), 660 UNTS 195.

the rights of residence of their population (Hadrosek, 1969).

The change of sovereignty does not prevail over the right of return to one's country (Tomuschat, 1989). The legal position is based on the fact that no state has the right to dispose of a population that was present on its territory before it was established.⁸⁹

The Human Rights Committee has affirmed, based on Article 12, par. 4, that: "one's own country is broader than the concept of country of one's nationality".⁹⁰ It is not limited to nationality in the formal sense and to the nationality acquired by birth and one's own conferral. This is the case where citizens do not have a nationality.⁹¹ Israel's refusal to extend Israeli citizenship to Palestinian Arabs was not based on a specific link with their country.

The lack of Burmese citizenship on the part of the Rohingya is immediately recalled, which did not prevent the ICC from affirming that they have the right to return to Myanmar. The Rohingya were not citizens according to the Myanmar government. Its legislation provided citizenship based on membership in certain ethnic groups that are part of its

⁸⁹Statement of Walter Schnitzel: *Les Transferts Internationaux des Populations*, 44(2) *Annuaire de l'Institut de droit international* (1952) 138, at 183 (statement of Walter Schnitzel).

⁹⁰Human Rights Committee, General Comment No. 27 Freedom of Movement (Article 12), §20, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9.

⁹¹Human Rights Committee, General Comment No. 27 Freedom of Movement (Article 12), §20, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9.

legislation. The Rohingya were not included in its list.⁹² As a result, they are stateless.⁹³ The ICC chamber held that the ban on repatriation constituted a crime against humanity, as it did not consider their lack of nationality as a factor to deny them the right to repatriation.⁹⁴

Repatriation of Palestinian Arabs and Jewish self-determination

Repatriation for Palestinian Arabs has emerged as a defense that is incompatible with Jewish self-determination, which grants Jews an exclusive right to Israeli territory while denying Palestinian Arabs the right to their repatriation. An Israeli legislative position on the matter stated:

“(...) The state of Israel is the nation-state of the Jewish People in which it realizes its natural, cultural, religious, and historical right to self-determination (...) The right to national self-determination in the State of Israel is exclusive to the Jewish people (...)”.

The force of this pronouncement under Israeli domestic law does not constitute a denial of international guarantees for the

⁹²Burma, Citizenship Law, par. 3, 15 October 1982: <https://www.refworld.org/docid/3ae6b4f71b.html>. Accessed on 20.09.2025.

⁹³Report of the independent international fact-finding commission on Myanmar, par. 21, 12 September 2018, UN Doc. A/HRC/39/64; and Briefing by Burmese Rohingya Organisation UK, Myanmar's 1982 Citizenship Law and Rohingya.

⁹⁴Pre-trial Chamber III, Situation in the People's Republic of Bangladesh/Republic/Republic of the Union of Myanmar, Request for Authorization of an Investigation Pursuant to Article 15, par. 75, 4 July 2019, ICC-01/19. 164 Israel, Basic Law: Israel-the nation-state of the Jewish People 5778-2018, par. 1, 19 July 2018.

right of return. The right of entry is not limited to the fact that a particular group enjoys self-determination in a given territory. Demographic considerations are not a defense. An Israeli official has criticized the ban on return, which thus affirms Israel's need to preserve a majority of Jewish origin in its population. A statement that is not supported by the law regarding the right of entry.

Right of entry and its application to descendants

Entry is a right for Palestinian Arabs, limiting only those who left voluntarily and personally (Lynch, 2018). Most Palestinian Arabs did not voluntarily leave Palestine and Israel because they are descendants born elsewhere.

The UN Commission of Inquiry defined the participants in the Great March of Return as the relative descendants of those who left their areas of origin since 1948.⁹⁵ They are multi-generational families, as designated by UNRWA, and as Palestinian refugees according to the UN General Assembly.⁹⁶ Their descendants are prohibited from returning, disguised as a general prohibition against their own return.

The case of the people from Chagos is noteworthy. In fact, in

⁹⁵Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, par. 18, 25 February 2019, UN Doc. A/HRC/40/74.

⁹⁶Assistance to Palestine refugees, UN General Assembly Res. 76/77, 9 September 2021.

this case the International Court of Justice recognized the right of return for a displaced population without distinguishing between them and those who left and were born later. Another legal impediment is the exclusion of descendants of children who live with their parents.

According to the Convention on the Rights of the Child, an exception is made in cases of abuse or neglect of minors by a parent, or in cases where states supervise a child who has been separated from their parents against their will.⁹⁷

In the case of separated parents, they have the right to allow their children to enter their territories. This is based on the provision of the Convention on the Rights of the Child, which in Article 10, paragraph 2, states:

“(...) States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country (...)”.

The right of admissibility

Jurisdiction under the ICC Statute emphasizes the right of admissibility. A case falling within the jurisdiction of the Court is inadmissible to the person requesting its trial in a national court.⁹⁸ If the case is dismissed and/or declared inadmissible at the request of the accused and/or *ex officio* pursuant to Art. 19

⁹⁷Convention on the Rights of the Child, 20 November 1989, Article 9(1), 1577 UNTS 3.

⁹⁸Article 17(1)(a) ICC.

ICC Statute (Ambos, 2022b), the prosecutor begins the relevant preliminary investigation for crimes against humanity and concludes the resulting investigation for the ongoing criminal prosecution in the state presumed to have committed the crimes. The ban on the entry of Palestinian Arabs as a criminal prosecution must in principle be brought before an Israeli court. Therefore, criminal proceedings are initiated in the courts of a state that follows the approach of universal jurisdiction for internationally defined crimes.⁹⁹ These are proceedings for crimes against humanity that have taken place in states because of a connection with such acts.¹⁰⁰

In the case under examination, all investigations and/or criminal proceedings were initiated in Israel due to the ban on the repatriation of Palestinian Arabs (Hill, 2022).

Prohibition of repatriation for another inhumane act

The crime of persecution and the prohibition of repatriation are considered as another inhumane act. This is a charge that was brought before both chambers of the ICC regarding the prohibition of the Rohingya from returning to Myanmar.

⁹⁹Statement by ICC Prosecutor Karim A.A. Khan KC regarding the opening of the trial related to events of 28 September 2009 in Guinea, signature of Agreement with Transitional Government on complementarity and closure of the Preliminary Examination: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september> Accessed on 20.09.2025.

¹⁰⁰Germany, Code of Crimes Against International Law (Völkerstrafgesetzbuch-VStGB), 26 June 2002, par. 7(10) (crimes against humanity: persecution).

According to Article 7, paragraph 1, letter k) of the ICC Statute, crimes against humanity include acts of a nature that caused great suffering, injury to the body, or impairment of physical or mental health (Cherif Bassiouni, 2011). These are necessary consequences for the charge of the crime of persecution.

The ICC Statute has defined inhumane acts under Article 7, paragraph 1, letter k), considering them to be serious violations of customary international law. Fundamental human rights derive from norms of international human rights law and are similar in nature to those provided for in Article 7, paragraph 1, ICC Statute.¹⁰¹

The severity of the deprivations inflicted on Palestinian Arabs, as well as the factual considerations that are relevant to great suffering, arise from the inability of victims to access their country and the virtual statelessness status, such as the loss of community and property and means of subsistence. Conditions in refugee camps have an impact on mental health (McKell, 2017).

The intent required to cause great suffering is contained in art. 7, para. 1, letter k), which speaks of intentional causes of suffering, serious injury to the body and to mental and physical health. The StICC defines intention with reference to one's conduct and the

¹⁰¹Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, par. 448, 30 September 2008, ICC-01/04-01/07.

consequences of this type of conduct.

An intentional conduct that presents the person according to art. 30, para. 2, letter a), and as it states “means to engage in the conduct” (Ambos, 2022b). Consequently, the intention seems to be present in the person who consciously intends to cause consequences according to art. 30, par. 2, letter b).

The suffering was based on the prohibition of repatriation. The prosecutor thus constituted a case that demonstrated its awareness of the circumstances of life in exile for Palestinian Arabs. This is a criminal proceeding that does not permit the inclusion of other inhumane acts and does not require a connection with another act and/or crime. This requirement exists for persecution, as does a similar requirement for other inhumane acts.

The basis for further investigation and inquiry

Since 2020, the prosecutor has been investigating Israeli officials who have denied entry to Palestinian Arabs (Kearney, 2020). We do not have an official, detailed investigation. The crime of persecution offers many avenues for escape.

Israeli officials are diverse, and the adoption of this conduct as part of a government operation is systematic, with widespread effects. The conduct is linked to acts provided for in Article 7, Article 1, ICC Statute, as well as war crimes. Jurisdiction over

the individual, given the accession of Palestine and Qatar, is that of the ICC Statute. The ICC prosecutor has informed the situation of Palestinian Arabs according to the UN's efforts to secure their repatriation.¹⁰² This information complies with its duty. According to the ICC Statute, the prosecutor has evaluated the information received. The investigation does not establish a reasonable basis for proceeding under Article 53, paragraph 1, ICC Statute.

The provision according to the principle based on the German theory of the “*legalitätsprinzip*” justifiably requires the facts of its own law (Damaška, 1981). The prosecutor has faced constraints (Pues, 2020) without being required to pursue criminal proceedings for crimes that are not serious for the interests of justice and as a consequence are not protected (Rashid, 2021).¹⁰³

The prosecutor does not enjoy broad discretion in the prosecution and is not found in national criminal justice systems (Pearson, 2020). The prosecutor appears to have an obligation to undertake the relevant preliminary examination and also obtain the relevant authorization for discretion in its system to follow investigations in the area (Rashid, 2021). The prosecutor has obtained and conducted a preliminary examination for the

¹⁰²Pre-Trial Chamber I, Situation in the State of Palestine, Submission on Behalf of Palestinian Victims Residents of the Gaza Strip, par. 18, 16 March 2020.

¹⁰³Article 53(1)(c) ICCS.

authorization of its own investigation.

The governments of Israel and Palestine have continued negotiations about the return of Palestinian Arabs. The dialogue still continues. The question of return facilitates negotiations and its own modalities.¹⁰⁴

Overall, the ban on return to Palestinian Arabs was the subject of a criminal investigation according to the StICC.

¹⁰⁴Declaration of Principles on Interim Self-Government Arrangements (Israel-PLO), §5, 13 September 1993, UN Doc. A/48/486, S/26560 (Annex).

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